3. In an action against a railroad for permitting filth to accumulate upon its right of way and thereby causing malaria in plaintiff's family, where there was evidence that plaintiff's own premises were in an unsanitary condition which might have caused the illness complained of, a charge to find for defendant if such illness may as well have resulted from other causes as from stagnant water on defendant's right of way was proper as it stood, and should not have been modified by adding thereto the clause, "unless . . . said stagnant water was the principal and substantive cause of the injury complained of, even though other causes may have contributed to a lesser extent, in which case" the finding should be for plaintiff.

BEACH et al. v. BELLWOOD et al.

June 15, 1905.

[51 S. E. 184.]

ESCROW—SURRENDER OF DEED AND AGREEMENT—EQUITY JURISDICTION—MUTUAL MISTAKE—PAROL EVIDENCE.

1. Where complainant took an absolute conveyance of land, and went into possession thereof, with the intention of retaining title unless the title was acquired by a certain electric railway or land company in which he was interested, and, to effectuate that intention, conveyed the land to a third person in escrow, with the understanding that, in case the electric railway project fell through, the title to land should not pass, and the escrow agreement was, by mutual mistake of the parties, so drawn as to omit the understanding, and, on the falling through of the electric railway project, the depositary refused to deliver the deed to the grantor, equity had jurisdiction to compel the delivery thereof and the surrender of the escrow paper.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, sec. 161; vol.. 19, Cent. Dig. Equity, secs. 14-19.]

2. Where the omission of material provisions from an instrument is alleged to be due to the mutual mistake of the parties, parol evidence is admissible to show the real intention of the parties, even though it varies the terms of the instrument.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, sec. 1993.]

WRIGHT v. AGELASTO.

June 15, 1905.

[51 S. E. 191.]

CORPORATIONS—STOCK SUBSCRIPTIONS — CONDITIONS — ACTIONS — INSTRUCTIONS—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

1. A condition attached to a corporate stock subscription, that $15,000 *bona fide* subscriptions should be obtained, could be waived by the subscriber.

2. In an action on a corporate stock subscription, conditioned on the corporation obtaining $15,000 *bona fide* subscriptions, which it had not obtained, an instruction that, though defendant applied for a charter for the corporation, was named as one of the incorporators, participated in the proceedings and acted as a director, yet if at the time he did so he did not know that *bona fide* valid subscriptions to such amount had not been obtained, his acts would not constitute a waiver of the condition, was properly refused without a qualifying requirement that defendant did not intend by such acts to waive the condition.

3. Where defendant had knowledge of certain testimony before the trial which became material during the trial, when he caused a summons to be issued for the witness, and, on his being reported absent from the city for the day, defendant made no request to the court to delay the trial, the evidence of such witness was not newly discovered so as to justify a new trial.

BISHOP v. BAGLEY et al.

June 15, 1905.

[51 S. E. 205.]

WATERS—ESTABLISHMENT OF DAM — REPORT OF COMMISSIONERS — SUFFICIENCY—CONCLUSIVENESS OF REPORT.

1. Where commissioners appointed in proceedings under Code 1887, sec. 1347 [Va. Code 1904, p. 753], to investigate and report on an application for the establishment of a mill and mill-dam on a certain stream, designated one of their number to write out the report and sign their names thereto, the subsequent acknowledgment in open court of the report, and their signatures by the commissioners who had not personally signed it, was a sufficient compliance with the law.

2. Under Va. Code 1904, p. 856, sec. 1353, concerning establishment of milldams, providing that if on the report of the commissioners, or on other evidence, it appears to the court that by granting such leave the health of the neighbors will be annoyed, the leave shall not be granted, the statement in the report of the commissioners that, if leave is granted, the health of the neighborhood will be annoyed by the stagnation of water caused by the pond, producing malaria, chills, and fever, is conclusive against the right of applicant to establish the dam.

WEST v. CITY OF NEWPORT NEWS.

June 15, 1905.

[51 S. E. 206.]

MUNICIPAL CORPORATIONS—TAXES—ASSESSMENT—FOLLOWING STATE LIST—ORDINANCES—CONSTRUCTION—BANK STOCK—MARKET VALUE — COMMISSIONER OF REVENUE—CHARTER DUTIES.

1. Under the express provisions of Const. art. 8, sec. 128 [Code, p. ccxliii], and Code 1904, p. 495, sec. 1033h, a municipal assessment of